This Order has been prepared and filed by the Court.

IN RE: NUVARING LITIGATION	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-3081-09 CIVIL ACTION **ORDER**

FILED
AUG 27 2012
BRIAN R. MARTINOTTI, J.S.C.

THIS MATTER having been opened to the Court upon the Defendants Organon USA Inc., Organon Pharmaceuticals USA Inc., and Organon International Inc.'s (hereinafter "Defendants") Motion to Compel Responses to Requests for Production of Documents; the Court having considered the moving papers, opposition thereto and the argument of counsel; and good cause having been shown;

For the reasons set forth in the accompanying Opinion;

IT IS on this 27th day of August, 2012,

ORDERED:

1. Defendants' Motions to Compel Responses to Requests for Production of Documents is hereby GRANTED;

2. Within fourteen (14) days of entry of this Order, all counsel of record in this litigation shall serve a complete written response to Defendants' March 30, 2012 Request for Production of Documents, stating in response to each request whether plaintiffs, plaintiffs' agent or plaintiffs' counsel is in possession of any responsive documents, and shall produce such documents within fourteen (14) days of the written response;

3. A copy of this Order shall be served upon all counsel of record within five (5) days of receipt and will also be posted to the Judiciary Website.

BRIAN R. MARTINOTTI, J.S.C.

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

IN RE: NUVARING® LITIGATION	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-3081-09 CIVIL ACTION

Argued: August 8, 2012
Decided: August 27, 2012

ARGUED BY:
For Plaintiffs: Shelly Leonard, Esq. (Blau, Brown & Leonard, LLC); Nicholas Farnolo, Esq. and W. Steven Berman, Esq. (Napoli Bern Ripka Shkolnik & Associates, LLP)

For Defendants: Melissa Geist, Esq., Thomas J. Yoo, Esq. (Reed Smith, LLP)

ALSO APPEARING:
For Plaintiffs: Hunter J. Shkolnik, Esq. (Napoli Bern Ripka Shkolnik & Associates, LLP)

For Defendants: Thomas J. Herten, Esq. (Archer & Greiner, PC)

MARTINOTTI, J.S.C.

This is a discovery motion. Specifically, Defendants' Motion to Compel Responses to Requests for Production of Documents. Plaintiffs have opposed this Motion.

FACTS/BACKGROUND[1]

The lawyers who represent plaintiffs in this NuvaRing® litigation also represent some plaintiffs in the YAZ/Yasmin® litigation, either here in New Jersey or in the MDL.[2] These include: Schlichter Bogard & Denton; Napoli, Bern, Ripka & Shkolnik; Rheingold, Valet, Rheingold & McCartney; Motley Rice; Lopez McHugh; Seeger Weiss; and Stark & Stark. In the YAZ/Yasmin® Litigation, these same lawyers retained and paid as experts two (2) European researchers: Ojvind Lidegaard and Jan Rosing. Both Lidegaard and Rosing have published "independent" studies (the "Studies") purporting to show that NuvaRing® poses a greater risk of thrombosis than certain other combined hormonal contraceptives ("CHCs").

Defense counsel asserts that, within the last year, plaintiffs' counsel – and their experts in this litigation – had pre-publication information about the Lidegaard and Rosing studies before they were published. These studies were the first published by Lidegaard specifically concerning NuvaRing®, and he published them after becoming employed by plaintiffs' counsel and after this litigation moved into expert discovery. These same lawyers have retained different experts for the NuvaRing® litigation who rely on the Studies.

On March 30, 2012, Defendants served plaintiffs with a request calling for the production of all documents reflecting interactions, payments, and communications between plaintiffs' counsel and Drs. Lidegaard and Rosing. (*See* Geist Cert., Ex. A). At

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[1] The Court focuses only on those facts underlying the instant Motion. For an overview of this litigation see the New Jersey Judiciary Multicounty Litigation Center, http://www.judiciary.state.nj.us/mass-tort/nuvaring/index.htm

[2] For further information on the pending YAZ/Yasmin litigation in New Jersey, see http://www.judiciary.state.nj.us/mass-tort/yaz/index.htm, and see http://www.ilsd.uscourts.gov/mdl/mdl2100.aspx, for the federal MDL. The MDL is being case managed by Hon. David Herndon, U.S.D.J., and the New Jersey litigation is being case managed by Hon. Brian R. Martinotti, J.S.C.

the April 11, 2012 Case Management Conference, plaintiffs' counsel informed the Court and defendants that they had no responsive documents for Defendants' discovery request. The Court ordered plaintiffs' counsel to state the same in writing in response to Defendants' discovery requests on that topic. One of plaintiffs' liaison counsel, Shelly Leonard, Esq., provided a response on behalf of "plaintiffs, by liaison counsel," denying that the plaintiffs themselves possessed any responsive documents, but did not respond as to whether counsel possessed any responsive documents. (*Id.*, Ex. B).

Defendants now move the court for an Order compelling plaintiffs' counsel to respond to defendants' discovery requests on behalf of themselves as well as their clients, the individual plaintiffs.

DEFENDANTS' ARGUMENT

Defendants allege that plaintiffs have stonewalled discovery into the financial relationships and communications by and between their counsel and Drs. Lidegaard and Rosing, the authors of the studies on which plaintiffs' NuvaRing® experts rely. Defendants argue that such discovery is relevant because plaintiffs' experts and lawyers were in possession of pre-publication information and study results from Lidegaard that dealt specifically with NuvaRing®. Defendants allege that plaintiffs' written response, following the April 11, 2012 Case Management Conference, which was only written on behalf of their clients, was in avoidance of Defendants' inquiry into the relationship between plaintiffs' counsel and Lidegaard and Rosing.[3] Defendants argue that this

[3] Mr. Yoo argued that "[i]f there's litigation driven science that's been paid for on the plaintiffs' side, of course it's going to be paid for by the plaintiffs' lawyers, not the individual plaintiffs who retain these lawyers on a contingency fee basis. So it's specious and it's superficial for them to say, well, our clients don't have it and we may have it, but we were wearing a different hat that day, so we're not going to give it to you." (Transcript at 73:18-74:1).

response is inadequate, especially in light of plaintiffs' representation to the Court and defense counsel at the April 11 Case Management Conference, and that, pursuant to *R.* 4:10-2, they are entitled to discovery if it is within counsel's possession.

Defendants also further argue that the precise nature and extent of the relationships between Lidegaard and Rosing and plaintiffs' counsel is relevant as the financial influence on studies will presumably be among plaintiffs' main themes during trial of this matter. Defendants contend that they are entitled to the documents they seek, if for no other reason than to allow fair opportunity for defendants to explore the claimed "independent" nature of the science on which plaintiffs' claims rely.

Defendants submit that Lidegaard and Rosing, experts compensated by the same lawyers in two separate hormonal contraceptive litigations, have generated the very literature that plaintiffs are using to impugn NuvaRing®.[4] These studies were published as recently as June 2012 during the expert phase of this litigation. Defendants contend that, not only is the timing alone suspect, but plaintiffs' counsel and their experts knew the studies were coming months before their publication. Accordingly, defendants seek documents that may reveal the precise nature and extent of the relationship between the lawyers and the researchers, contending the same is clearly relevant to this litigation.

In sum, defendants argue that, just as plaintiffs will argue that defendants funded certain NuvaRing® studies, due process dictates that defendants be able to present evidence that the conclusions that Lidegaard and Rosing have published have been biased or influenced by plaintiffs or are otherwise "litigation driven."

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[4] At oral argument, counsel argued that "[f]or [plaintiffs' counsel] to say, well, you know, I retained Dr. Lidegaard in the YAZ litigation, I didn't designate him in NuvaRing, it's a superficial argument." (53:19-22).

PLAINTIFFS' RESPONSE

Plaintiffs argue that they have properly responded to defendants' discovery requests and, in any event, the requests are outside the permitted scope of discovery.

As an initial matter, plaintiffs argue that defendants have presented no applicable Court Rule or precedent that supports their probe for evidence which allegedly does not exist. Plaintiffs' liaison counsel in the NuvaRing® litigation has denied the existence of any supposed materials relating to the alleged relationship between Plaintiffs liaison counsel and Drs. Lidegaard and Rosing. Moreover, plaintiffs submit that they did not "side step" a response to the defendant by somehow responding "only" on behalf of their clients; such a claim is purely fictional.[5] Plaintiffs argue defendants' request amounts to nothing more than a "fishing expedition," especially in light of the fact that they have requested materials from individuals who are not experts in this litigation, but rather materials from other litigations that are subject to State and Federal protective orders. Instead, plaintiffs suggest that defendants' discovery requests are intended to do nothing more than harass plaintiffs' counsel and plaintiffs' experts as defendants have not offered a scintilla of evidence indicating that plaintiffs' counsel was involved in the results of the Lidegaard study.

Plaintiffs assert that no responsive documentation exists and, assuming they did, defendants would be required to make a showing of "substantial need" and "undue hardship" in obtaining the substantial equivalent by other means. Plaintiffs maintain that defendants have not even attempted to meet this standard, nor can they do so.

[5] Plaintiffs note that, not only did plaintiffs expressly state that they believed defendants' request was improper because it was directed at plaintiffs' counsel, plaintiffs responded to defendants' request denying possession of any materials responsive to defendants' request. (*See* Shkolnik Cert., Ex. A).

DEFENDANTS' REPLY

Defendants reply that, at the precise time when Drs. Lidegaard and Rosing were actively conducting and evaluating research on NuvaRing®, both were retained as experts in the YAZ/Yasmin® litigation, by the same lawyers who represent the NuvaRing® plaintiffs here. Drs. Lidegaard's and Rosing's relationships with plaintiffs' counsel – especially relating to NuvaRing® – and the payments they received in the course of these relationships are unquestionably relevant to the issue of bias in this litigation; *i.e.*, to the weight and credibility the jury assigns to the conclusions made by these researchers about NuvaRing® generated during the time they were paid by plaintiffs' counsel.

In this case, plaintiffs' counsel have questioned every defense expert about industry funding of the studies on which defendants rely in an attempt to create a record that will enable them to stand before the jury and argue that defendants' funding of studies has affected the results of those studies. At the same time, plaintiffs attempt to use the Lidegaard and Rosing studies, proclaiming that these "independent" studies should command the jury's attention. Defendants argue that they are entitled to test this "independence."

Moreover, while plaintiffs protest that, by raising issues related to YAZ/Yasmin®, defendants overstep the bounds of permissible discovery, defendants submit that the information is directly relevant to issues of bias in this litigation, and plaintiffs must not be allowed to shield it from discovery. [6]

[6] Mr. Yoo explained during oral argument that cross-examination of plaintiffs' experts at trial would be an ineffective method of disclosing the "independence" of the studies upon which plaintiffs' experts rely: "Th[e] expert is going to disavow any knowledge of the dealings between plaintiffs' counsel and Lidegaard and Rosen [sic]. That's why we need this information, because it amounts to bias

In addition, defendants submit that arguing that responding would be too onerous – due to the number of law firms involved – or that responsive documents are privileged, belies plaintiffs' claim that no responsive documents exists. Rather, defendants submit that if all of plaintiffs' counsel, as officers of this Court, represent that they have no responsive documents, then so be it. But this, according to defendants, is the questions that plaintiffs have refused to answer. As there is no valid legal basis for refusing to turn over documents that are relevant to the bias of purportedly "independent" scientific studies, especially when these studies have become the centerpiece of plaintiffs' claims against NuvaRing®, defendants submit their motion should be granted.

DECISION

I. Scope of Discovery in New Jersey

The scope of discovery as set forth in the New Jersey Court Rules must be "construed liberally, for the search for truth in aid of justice is paramount." *Harmon v. Great Atl. & Pac. Tea Co.*, 273 N.J. Super. 552, 556 (App.Div. 1994) (citing *Myers v. St. Francis Hospital*, 91 N.J.Super. 377, 385 (App.Div.1966)).

Rule 4:10-2(a) provides, in pertinent part, as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the

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laundering.... For the testifying expert to say, I know nothing about that, that shuts the door on a real issue of potential bias. (Transcript at 75:14-25).

> discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

In addition, "relevant evidence" is defined as any "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E.* 401.[7]

Our courts have consistently held that pretrial discovery should be accorded the broadest possible latitude. *See, e.g., Jenkins v. Rainner*, 69 N.J. 50, 56 (1976); *In re Selser*, 15 N.J. 393, 405 (1954); *Blumberg v. Dornbusch*, 139 N.J.Super. 433, 437 (App.Div.1976); *Myers*, 91 N.J.Super. at 385; *Rogotzki v. Schept*, 91 N.J.Super. 135, 146 (App.Div.1966); *Interchemical Corp. v. Uncas Printing & Finishing Co., Inc.*, 39 N.J.Super. 318, 325 (App.Div.1956);*Martin v. Educational Testing Serv., Inc.*, 179 N.J.Super. 317, 327 (Ch.Div.1981). The scope of discovery, however, is not unlimited. State v. D.R.H., 127 N.J. 249, 256 (1992). Therefore, the discovery process may not be used to engage in a "fishing expedition" for evidence. *Axelrod v. CBS Publications*, 185 N.J. Super. 359, 372 (App. Div. 1982); *Absolut Spirits Co., Inc. v. Monsieur Touton Selection, Ltd.*, 2007 WL 3051431, at *3 (App. Div. Oct. 22, 2007); *In re Venezia*, 191 N.J. 259, 284 (2007) ("this limited inquiry is not a license to conduct a fishing expedition"); *Stout v. Toner*, 125 N.J. Super. 490. 490, 491 (Law Div. 1973) ("courts in their discretion usually disallow harassing fishing expeditions").

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[7] At oral argument, plaintiffs' counsel argued that any such responsive documents, if they existed, would be privileged because they would be subject to State and Federal protective orders in place in other litigations. However, the New Jersey Rules of Evidence defines the scope of the attorney-client privilege as "communications between lawyer and his client in the course of that relationship and in professional confidence." *N.J.R.E.* 504; *see also N.J.R.E.* 506 (defining the scope of the physician-patient privilege). Information pertaining to the relationship, if any, between plaintiffs' counsel and Drs. Lidegaard and Rosing is not "privileged." As a matter of law, though, these documents may fall within the purview of the State/MDL protective order.

II. Positional Bias

Courts in this and other jurisdictions have commented on when discovery into the precise nature and extent of the relationship between lawyers and researchers is relevant. *See e.g., Campetiello v. Pizarro*, 2012 WL 1813419, at *9 (N.J. Super. A.D., May 21, 2012) ("[I]t is a fair arugment to highlight the source of an expert's compensation to demonstrate potential bias"); *Williams v. Corby's Enterprise Laundry*, 64 N.J. Super. 561, 567 (App. Div. 1960) (interest or bias of witness is a relevant consideration in evaluating his testimony); *Gensollen v. Pareja*, 416 N.J. Super. 585, 591 (App. Div. 2010) (discussing allowable discovery to demonstrate expert's potential bias); *In re Welding Fume Prods. Liab. Litig.*, 534 F. Supp. 2d 761, 770-71 (N.D. Oh. 2008). Courts have also concluded that if possible bias is relevant, then possibly-biasing factors are as well, particularly where an expert generates articles and studies upon which a party and their experts rely. *Id.*

III. Possession of Counsel

Documents pertaining to the relationship between plaintiffs' counsel and experts are discoverable even if plaintiffs themselves do not possess such documents. Rule 4:18-1 of the New Jersey Court Rules provides for discovery of documents and things within the "possession, custody or control of the party on whom the request is served." *R.* 4:18-1(a). Courts have noted that, "for purposes of discovery under Fed. R. Civ. P. 34, documents in the possession of a party's current or former counsel are deemed to be within that party's possession or control." *Ashman v. Solectron Corp.*, 2009 WL 1684725, at *5 (N.D. Cal., June 12, 2009) (internal marks and citations omitted). *See*

also, e.g, Arkwright Mutual Ins. Co. v. Nat'l Union Fire Ins. Co., 1994 WL 510043, at *3 (S.D.N.Y., Sept. 19, 1994) (documents in the possession of party's counsel are deemed within the control of the party, regardless of the origin of the documents) and cases cited therein.

IV. Drs. Lidegaard & Rosing

In this case, Drs. Lidegaard and Rosing were experts retained by lawyers who represent plaintiffs in both the YAZ and NuvaRing® litigations. These experts generated the exact literature that plaintiffs are now attempting to use to impugn NuvaRing® in this litigation. The record reveals that plaintiffs' experts and lawyers were aware of such research and results prior to publication in June 2012, during the expert phase of discovery in this litigation. *See, e.g.,* Geist Cert., Ex. H at 452:10-453:6 (Steven Levine, M.D.); Ex. I at 333:19-335:17 (Suzanne Parisian, M.D.); Ex. J at 331:4-5 (Valerie S. Ratts, M.D. and Roger Denton, Esq.). Plaintiffs have portrayed Lidegaard's and Rosing's studies as "independent research" and have emphasized such studies while attacking defendants' experts as having been "tainted" by industry sponsorship. However, plaintiffs have not revealed documentation allowing defendants the opportunity to explore the "independent" nature of the science on which plaintiffs rely. Here, by raising the issue of funding source bias, plaintiffs have opened the door to discovery into the independent nature of the Studies and would have an unfair advantage at trial if they were allowed to shield it from discovery.[8] Defendants are, therefore, entitled to discover how

[8] In particular, plaintiffs and their experts will presumably seek to argue at trial that industry sponsorship has tainted the studies hailed by defense counsel, while the studies relied upon by plaintiffs' experts are "independent." (*See, e.g.*, Geist Cert., Ex. K at 287:15-20).

and to what extent the relationships between plaintiffs' counsel and experts have biased and influenced NuvaRing® studies and expert opinions.[9]

Plaintiffs' counsel have stated to the Court that they did not possess any responsive information, yet only provided written responses to Defendants' document requests on behalf of their clients in the NuvaRing® litigation and not counsel themselves – whether referring to YAZ® counsel or NuvaRing® counsel.[10] Even if plaintiffs, the individual clients, do not possess the responsive information, documents in the possession of a counsel are still subject to discovery. Defendants are entitled to discovery within plaintiffs' counsel's possession and plaintiffs' counsel must respond as to whether such documents exist and are in their possession.

In this case, plaintiffs' experts have relied on publications by Lidegaard and Rosing; in particular, studies dealing specifically with NuvaRing® and published during the expert discovery phase of this litigation. These authors, though not designated as experts in this litigation, have been used by plaintiffs' counsel as experts in other litigations. Evidence of a possible relationship between plaintiffs' counsel and the authors of the studies upon which plaintiffs' experts rely would clearly be relevant to this litigation – regardless of whether or not these authors have been retained as experts in this litigation. Therefore, discovery into the relationships, if any, between plaintiffs' counsel and Lidegaard and Rosing is relevant and must be permitted.

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[9] The Court makes no comment as to whether this inquiry would be permitted at trial – but certainly, under New Jersey's broad discovery rules, this information is discoverable.

[10] If plaintiffs' counsel is in possession of responsive documents they are required to disclose them to defense counsel. It is of no moment that the documents were originally commissioned as part of the experts' employ during the YAZ litigation. These documents specifically address NuvaRing® and were allegedly sponsored by plaintiffs' counsel in this (NuvaRing®) litigation; clearly the documents are relevant to and discoverable in this litigation.

For these reasons, plaintiffs' counsel are required to respond in writing to defendants' March 30, 2012 document requests, clearly and unequivocally stating whether they have responsive documents reflecting payments to or communications between plaintiffs' counsel and Drs. Lidegaard or Rosing. Should plaintiffs' counsel answer affirmatively (*i.e.*, that counsel is in possession of responsive documents), but contend that disclosure is not permitted because of the protective order in the YAZ litigation, then counsel has the burden to demonstrate that any such documents are subject to various State and Federal protective orders. If the Court finds that the documents are subject to protective orders imposed in other litigations, defendants may seek relief in the appropriate jurisdiction(s).

CONCLUSION

For the reasons stated herein, Defendants' Motion is GRANTED.